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4 BEFORE THE PERSONNEL APPEALS BOARD
5 STATE OF WASHINGTON
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7 SHERRI BERG) Case No. DISM-03-0069
8 Appellant,)
9 v.) FINDINGS OF FACT, CONCLUSIONS OF
10 DEPARTMENT OF NATURAL RESOURCES,) LAW AND ORDER OF THE BOARD
11 Respondent.)
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14 I. INTRODUCTION

15 1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for
16 hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair, and BUSSE
17 NUTLEY, Member. The hearing was held in the Personnel Appeals Board Hearing Room, 2828
18 Capitol Boulevard, Olympia, Washington, on August 3, 2004.

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20 1.2 **Appearances.** Appellant Sherri Berg was present and was represented by Shelley Brandt,
21 Attorney at Law, of Cordes Brandt, PLLC. Kari Hanson, Assistant Attorney General, represented
22 Respondent Department of Natural Resources (DNR).

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24 1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of
25 duty and insubordination. Respondent alleges Appellant failed to cooperate in a fitness for duty
26 independent medical examination as directed on two separate occasions.

II. FINDINGS OF FACT

2.1 Appellant Sherri Berg was a Secretary Senior and permanent employee for Respondent Department of Natural Resources. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on August 15, 2003.

2.2 By letter dated July 22, 2003, Mark Kahley, Resource Protection Division Manager and Appellant's appointing authority, notified Appellant of her dismissal for neglect of duty and insubordination effective August 6, 2003. Mr. Kahley alleged Appellant failed to cooperate in a fitness for duty independent medical examination (IME) when she failed to appear at her May 19, 2003 scheduled appointment and failed to fully participate in the rescheduled appointment on June 23, 2003.

2.3 Appellant was employed at the Department of Natural Resources for nine years and spent two years working in the Resource Protection Division. Appellant received a previous notice of discipline on March 24, 2003, for making an inappropriate, threatening comment to a co-worker.

2.4 On April 17, 2003, Mr. Kahley met with Appellant and issued her a memo addressing concerns that he and other staff had regarding her recent behavior. The memo further stated:

. . . To help me determine your fitness for duty as a Secretary Senior, I am directing you to cooperate in an independent medical examination. This direction to cooperate in a medical examination for the purpose of evaluating your fitness for duty is a lawful directive from me as your manager. Failure to comply with this directive would be cause to consider appropriate discipline.

1 2.5 During the April 17 meeting, Appellant said she would not attend an IME. As a result, Mr.
2 Kahley issued a second memo stating:

3 . . . I am concerned by the response you gave me several times that you
4 will not comply with my direction. . . . I would consider an outright
5 refusal to comply defiance of my lawful authority as your manager. . .
6 [w]illfull defiance of lawful authority would be insubordination.

7 2.6 By letter dated April 21, 2003, Mr. Kahley notified Appellant that Lou Ann Dunlap, Human
8 Resource Consultant, would arrange an appointment with Dr. John Hamm. Mr. Kahley also
9 informed Appellant that Ms. Dunlap would provide her with a consent for release of medical
10 information form to be returned to him no later than May 5, allowing adequate time for Appellant
11 and her attorney to review the form.

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13 2.7 On April 29, 2003, Ms. Dunlap hand-delivered to Appellant a copy of Mr. Kahley's April
14 28, 2003 letter to Dr. Hamm confirming Appellant's scheduled appointment on May 19, 2003. A
15 few days prior to the May 19 appointment, Mr. Kahley reminded Appellant of her appointment via
16 e-mail. Mr. Kahley's letter to Dr. Hamm addressed five "job related questions" as follow:

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- 18 1. What is your evaluation of Ms. Berg's fitness for duty as it relates to
19 performing the job duties of this position?
 - 20 2. Following your examination, do you believe that Ms. Berg's
21 performance of her job duties could result in her bringing harm to either
22 herself or others?
 - 23 3. Are there any job related limitations arising from a medical condition
24 that prevent Ms. Berg from performing the essential functions of this
25 position? If your answer is yes, please describe.
 - 26 4. How would these limitations affect Ms. Berg's ability to perform the job
duties of this position?
 5. If there are limitations affecting Ms. Berg's ability to perform the
essential functions of this position, are there accommodations you can

1 recommend to the department to assist Ms. Berg in fulfilling the duties
2 of her position?

3 2.8 During the April 29 meeting, Ms. Dunlap also hand-delivered to Appellant DNR's Consent
4 for Release of Medical Information form as a separate document. DNR's medical release form
5 specifically referenced the questions posed to Dr. Hamm in the April 28 letter.

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7 2.9 By letter dated May 6, 2003, Appellant's counsel addressed a fax communication to
8 Department of Natural Resources requesting Appellant's complete personnel file and stating:

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10 . . . If the Department of Natural Resources has specific questions it
11 would like a physician to answer about Ms. Berg's ability to perform the
12 essential functions of her job or her fitness for performing her job, that
13 might be appropriate, but I see absolutely no basis for Ms. Berg to
generally release any physician in the broad spectrum to release medical
information about her.

14 2.10 Appellant requested additional clarification when on May 16, 2003, counsel for Appellant
15 sent a letter to Mr. Kahley addressing the need for an IME.

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17 . . . I have seen nothing that would indicate that Ms. Berg's performance
18 would suggest that she should submit to an independent medical
19 evaluation and sign a release of information so that her employer has
20 complete freedom with which to speak with a medical provider about
her medical information.

21 2.11 Appellant did not attend the May 19 appointment and did not inform her supervisor of the
22 missed appointment.

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24 2.12 By letter dated May 29, 2003, Mr. Kahley informed Appellant he was considering
25 discipline up to and including dismissal for her failure to report to the May 19 IME. On or about
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1 June 6, Appellant's counsel contacted Mr. Kahley to request additional time for Appellant to
2 consider the IME, and he granted a short extension.

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4 2.13 On June 13, 2003, Mr. Kahley received notice that Appellant agreed to attend her second
5 scheduled IME to avoid disciplinary action.

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7 2.14 On June 23, 2003, Appellant arrived at her appointment and initially participated in the
8 exam until Dr. Hamm presented her with a general medical release form, which Appellant refused
9 to sign. Without Appellant's consent to release medical information, Dr. Hamm halted the
10 diagnostic examination and notified Mr. Kahley by voicemail of his inability to provide a medical
11 evaluation as it pertained to Appellant's fitness for employment.

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13 2.15 After meeting with Dr. Hamm, Appellant returned to work on June 23 but did not inform her
14 superiors the exam was incomplete nor did she discuss rescheduling the exam with anyone.

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16 2.16 By letter dated June 25, 2003, Mr. Kahley informed Appellant he was once again
17 considering discipline for the same reasons outlined in the May 29 letter. Mr. Kahley offered
18 Appellant the opportunity to respond to the charges either in person or in writing by July 21 and
19 stated he would need to be notified immediately if alternative dates were to be considered.

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21 2.17 By fax on July 11, Appellant's counsel notified Mr. Kahley of her unavailability on July 21;
22 therefore, Mr. Kahley reviewed Appellant's written response. Mr. Kahley considered various forms
23 of discipline, but without a qualified physician's assurance of Appellant's mental stability, he
24 determined he could not ensure the safety of his employees with any discipline less than dismissal.

1 2.18 Mr. Kahley concluded Appellant willfully defied his repeated directives to cooperate in an
2 IME, and he determined her refusal to comply constituted neglect of duty and insubordination.

3 4 5 **III. ARGUMENTS OF THE PARTIES**

6 3.1 Respondent asserts Mr. Kahley directed Appellant to undergo an independent medical
7 examination to determine her fitness for duty, because she had been exhibiting increasingly erratic
8 behavior that affected co-workers and her job performance was lacking. Respondent argues the
9 only way to determine Appellant's ability to perform the essential functions of her job was through
10 an IME and argues she does not contest the IME requirement. Respondent contends Appellant had
11 advance notice of the IME appointment as well as additional time to resolve any issues regarding
12 the release of medical information. Respondent further contends there are no substantive issues
13 regarding confidentiality, and its request for Appellant's medical diagnosis was strictly limited to
14 specific answers relating to her fitness for employment. Respondent argues Appellant never
15 returned DNR's consent for release of medical information form to Mr. Kahley, so he assumed she
16 would take it directly to the medical appointment. Respondent argues Appellant willfully
17 disregarded explicit directives to attend the IME and failed to notify anyone in the agency when she
18 missed her first appointment and failed to complete her subsequent appointment with Dr. Hamm.
19 Respondent argues Appellant repeatedly refused to participate in the IME process as directed, and,
20 therefore, this is a straightforward case of insubordination and neglect of duty. Respondent argues
21 Appellant's lack of cooperation left Mr. Kahley no alternative other than dismissal.

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23 3.2 Appellant argues she does not question the agency's authority to require an IME. Appellant
24 contends she was not unwilling to submit to an IME, but she had concerns about the release of her
25 medical information and who would be receiving it. Appellant argues she did not attend the first
26 IME appointment because her attorney was still in the process of negotiating the medical release

1 form, and she wanted to be certain the language was legally correct before submitting to an exam.
2 Appellant argues she received a packet of information regarding the IME but does not specifically
3 recall the consent for release of medical information form. Appellant asserts it was her
4 understanding, based on Mr. Kahley's request to return the form to him by May 5, that the agency
5 would provide Dr. Hamm with the appropriate release form. Appellant argues she intended to
6 cooperate but was given inaccurate information. Appellant asserts she was prepared to go forward
7 with the second exam but was caught off guard when presented with a general release of medical
8 information form and was uncomfortable signing it. Appellant contends she had every intention of
9 rescheduling the diagnostic portion of the exam once the details of the medical release were
10 resolved but was denied that opportunity.

11 12 13 **IV. CONCLUSIONS OF LAW**

14 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.
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16 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
17 the charges upon which the action was initiated by proving by a preponderance of the credible
18 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
19 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
20 Corrections, PAB No. D82-084 (1983).
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22 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
23 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
24 of Social & Health Services, PAB No. D86-119 (1987).
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1 4.4 Insubordination is the refusal to comply with a lawful order or directive given by a superior
2 and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v.
3 Dep't of Social & Health Services, PAB No. D94-025 (1995).

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5 4.5 Respondent has proven by a preponderance of the evidence that Appellant was
6 insubordinate when she failed to follow through with the IME as directed, despite numerous
7 warnings that failure to do so would result in disciplinary action. Furthermore, Appellant had a
8 duty to communicate with her superiors when she missed one appointment and failed to complete
9 the second appointment. Even though Appellant raised concerns about releasing her medical
10 information, Respondent's questions to Dr. Hamm were very narrow and pertained only to her
11 ability to function in her position as a Secretary Senior. There is no evidence Respondent wanted to
12 accomplish anything other than to determine Appellant's mental stability to ensure a safe,
13 productive working environment, and the April 28 letter to Dr. Hamm clearly stated the purpose for
14 the examination. In addition, Appellant had ample opportunity to collaborate with the agency on
15 specific language used in the consent form. Therefore, Appellant's reasons for not attending or
16 participating in the exams are not reasonable under the circumstances. Appellant had an obligation
17 to cooperate with her employer, but she consistently failed to communicate her intentions
18 concerning the IME with any of her superiors.

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20 4.6 Under the facts and circumstances, we conclude dismissal is the appropriate sanction, and
21 the appeal of Sherri Berg should be denied.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Sherri Berg is denied.

DATED this _____ day of _____, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Gerald L. Morgen, Vice Chair

Busse Nutley, Member